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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[Docket No. 130703588-4658-01]

RIN 0648-BD44

International Fisheries; Western and Central Pacific Fisheries for Highly Migratory Species; Fishing Restrictions regarding the Oceanic Whitetip Shark, the Whale Shark, and the Silky Shark

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes regulations under authority of the Western and Central Pacific Fisheries Convention Implementation Act (WCPFC Implementation Act) to implement decisions of the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (Commission or WCPFC) on fishing restrictions related to the oceanic whitetip shark (Carcharhinus longimanus), the whale shark (Rhincodon typus), and the silky shark (Carcharhinus falciformis). The regulations would apply to owners and operators of U.S. fishing vessels used for commercial fishing for highly migratory species (HMS) in the area of application of the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (Convention). The regulations for oceanic whitetip sharks and silky sharks would prohibit the retention, transshipment, storage, or landing of oceanic whitetip sharks or silky sharks and would require

the release of any oceanic whitetip shark or silky shark as soon as possible after it is caught, with as little harm to the shark as possible. The regulations for whale sharks would prohibit setting a purse seine on a whale shark and would specify certain measures to be taken and reporting requirements in the event a whale shark is encircled in a purse seine net. This action is necessary for the United States to satisfy its obligations under the Convention, to which it is a Contracting Party.

DATES: Comments must be submitted in writing by [Insert date 45 days after date of publication in the FEDERAL REGISTER].

ADDRESSES: You may submit comments on this proposed rule, identified by NOAA-NMFS-2014-0086, and the regulatory impact review (RIR) prepared for this proposed rule, by either of the following methods:

- Electronic Submission: Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2014-0086, click the “Comment Now!” icon, complete the required fields, and enter or attach your comments.
- Mail: Submit written comments to Michael D. Tosatto, Regional Administrator, Pacific Islands Regional Office, NOAA Inouye Regional Center, 1845 Wasp Blvd., Building 176, Honolulu, HI 96818.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, might not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on www.regulations.gov without change. All personal identifying information (e.g., name and address), confidential business information, or otherwise sensitive information submitted

voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter “N/A” in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

An initial regulatory flexibility analysis (IRFA) prepared under authority of the Regulatory Flexibility Act is included in the Classification section of the SUPPLEMENTARY INFORMATION section of this proposed rule.

Copies of the RIR and the Environmental Assessment (EA) are available at www.regulations.gov or may be obtained from Michael D. Tosatto, NMFS PIRO (see address above).

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this proposed rule may be submitted to Michael D. Tosatto, Regional Administrator, NMFS PIRO (see address above) and by e-mail to OIRA_Submission@omb.eop.gov or fax to 202-395-7285.

FOR FURTHER INFORMATION CONTACT: Rini Ghosh, NMFS PIRO, 808-725-5033.

SUPPLEMENTARY INFORMATION:

Background on the Convention

A map showing the boundaries of the area of application of the Convention (Convention Area), which comprises the majority of the western and central Pacific Ocean (WCPO), can be found on the WCPFC Web site at: www.wcpfc.int/doc/convention-area-map. The Convention focuses on the conservation and management of highly migratory species (HMS) and the management of fisheries for HMS. The objective of the Convention is to ensure, through effective management, the long-term conservation and sustainable use of HMS in the WCPO. To accomplish this objective, the Convention establishes the Commission for the Conservation and

Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (WCPFC). The WCPFC includes Members, Cooperating Non-members, and Participating Territories (collectively, CCMs). The United States is a Member. American Samoa, Guam, and the Commonwealth of the Northern Mariana Islands (CNMI) are Participating Territories.

As a Contracting Party to the Convention and a Member of the WCPFC, the United States is obligated to implement the decisions of the WCPFC. The WCPFC Implementation Act (16 U.S.C. 6901 et seq.), authorizes the Secretary of Commerce, in consultation with the Secretary of State and the Secretary of the Department in which the United States Coast Guard is operating (currently the Department of Homeland Security), to promulgate such regulations as may be necessary to carry out the obligations of the United States under the Convention, including the decisions of the WCPFC. The WCPFC Implementation Act further provides that the Secretary of Commerce shall ensure consistency, to the extent practicable, of fishery management programs administered under the WCPFC Implementation Act and the Magnuson-Stevens Fishery Conservation and Management Act (MSA; 16 U.S.C. 1801 et seq.), as well as other specific laws (see 16 U.S.C. 6905(b)). The Secretary of Commerce has delegated the authority to promulgate regulations under the WCPFC Implementation Act to NMFS.

WCPFC Decision on the Oceanic Whitetip Shark

The WCPFC adopted “Conservation and Management Measure for Oceanic Whitetip Shark” (CMM 2011-04) to address recent declines in catch rates and size of oceanic whitetip sharks in the longline and purse seine fisheries. CMM 2011-04 includes two provisions for CCMs to apply to their vessels. The first provision requires CCMs to prohibit their vessels from retaining on board, transshipping, storing on board, or landing any oceanic whitetip shark, in whole or in part, in the fisheries covered by the Convention. The second provision requires

CCMs to require their vessels to release any oceanic whitetip shark that is caught as soon as possible after the shark is brought alongside the vessel, and to do so in a manner that results in as little harm to the shark as possible. CMM 2011-04 also includes a provision that acts as a limited exemption from the other provisions by allowing observers to collect samples from oceanic whitetip sharks that are dead on haulback, provided that the collection is part of a research project approved by the WCPFC Scientific Committee. The proposed rule would implement all of these provisions for U.S. fishing vessels, as detailed in the section below titled “Proposed Action.”

WCPFC Decision on the Whale Shark

The WCPFC adopted “Conservation and Management Measure for Protection of Whale Sharks from Purse Seine Fishing Operations” (CMM 2012-04) in response to concerns about the potential impacts of purse seine fishing operations on the sustainability of the whale shark. Paragraph 1 of CMM 2012-04 specifies that the measure applies only to the high seas and exclusive economic zones (EEZs) in the area of application of the Convention (Convention Area) (i.e., not to territorial seas or archipelagic waters). CMM 2012-04 includes four specific provisions for CCMs to implement for their vessels. The first provision requires CCMs to prohibit their flagged vessels from setting a purse seine on a school of tuna associated with a whale shark if the animal is sighted prior to the commencement of the set. The measure specifies that in the EEZs of Parties to the Nauru Agreement (PNA), the prohibition shall be implemented in accordance with the “Third Arrangement Implementing the Nauru Agreement Setting Forth Additional Terms and Conditions of Access to the Fisheries Zones of the Parties,” as amended on September 11, 2010 (Third Arrangement). The Third Arrangement states that no purse seine vessel shall engage in fishing or related activity in order to catch tuna associated with whale

sharks and that the provisions of the Third Arrangement shall be implemented in accordance with a program adopted by the Parties. The United States is not a party to the Nauru Agreement and has no role in implementing it or the Third Arrangement. It is expected that the PNA will implement this provision of the CMM in their EEZs in accordance with the Third Arrangement. Accordingly, this proposed rule would not implement the prohibition in the EEZs of the PNA, but would implement the prohibition in all other EEZs and on the high seas in the Convention Area, as detailed in the section below titled “Proposed Action.”

The second and third provisions of CMM 2012-04 require CCMs to require that operators of their vessels take certain measures in the event that a whale shark is encircled in a purse seine net: the operator shall ensure that reasonable steps are taken to ensure the safe release of the shark; and report the incident to the relevant authority of the flag State, including the number of individuals, details of how and why the encirclement happened, where it occurred, steps taken to ensure safe release, and an assessment of the life status of the whale shark on release (including whether the animal was released alive, but subsequently died). These two provisions are applicable to the high seas and all EEZs in the Convention Area, including the EEZs of the PNA. The proposed rule incorporates these two provisions, as detailed in the section below titled “Proposed Action.”

The final provision of CMM 2012-04 for CCMs to apply to their vessels is for CCMs to require their vessels to follow any guidelines adopted by the WCPFC for the safe release of whale sharks. The proposed rule would not implement this provision because the WCPFC has not yet adopted guidelines for the safe release of whale sharks.

CMM 2012-04 also specifies the importance of maintaining the safety of the crew during the implementation of the provisions in the CMM, and this concept has been included in the proposed rule.

WCPFC Decision on the Silky Shark

The WCPFC adopted “Conservation and Management Measure for Silky Sharks” (CMM 2013-08) in response to the results of the recent WCPFC stock assessment, showing that the species is overfished and that overfishing is occurring. The provisions of CMM 2013-08 are similar to the provisions of CMM 2011-04. One provision requires CCMs to prohibit their vessels from retaining on board, transshipping, storing on board, or landing any silky shark, in whole or in part, in the fisheries covered by the Convention. Another provision requires CCMs to require their vessels to release any silky shark that is caught as soon as possible after the shark is brought alongside the vessel, and to do so in a manner that results in as little harm to the shark as possible. CMM 2013-08 also includes a provision that acts as a limited exemption from the other provisions by allowing observers to collect samples from silky sharks that are dead on haulback, provided that the collection is part of a research project approved by the WCPFC Scientific Committee. The proposed rule would implement all of these provisions for U.S. fishing vessels, as detailed in the section below titled “Proposed Action.”

Proposed Action

This proposed rule would implement the provisions of CMM 2011-04, CMM 2012-04, and CMM 2013-08, described above, for U.S. fishing vessels used for commercial fishing for HMS in the Convention Area. The proposed rule includes six elements – three elements regarding the oceanic whitetip shark and silky shark and three elements regarding the whale shark. For the oceanic whitetip shark and silky shark, the first element would prohibit the crew,

operator, and owner of a fishing vessel of the United States used for commercial fishing for HMS from retaining on board, transshipping, storing, or landing any part or whole carcass of an oceanic whitetip shark or silky shark that is caught in the Convention Area. The second element would require the crew, operator, and owner to release any oceanic whitetip shark or silky shark caught in the Convention Area as soon as possible after the shark is caught and brought alongside the vessel and take reasonable steps for its safe release, without compromising the safety of any persons. The third element takes into consideration that, notwithstanding the other two oceanic whitetip and silky shark elements of the rule, WCPFC observers may collect samples of oceanic whitetip sharks or silky sharks that are dead when brought alongside the vessel and may require the crew, operator, or owner of the vessel to allow or assist them to collect samples in the Convention Area. Observers deployed by NMFS or the Forum Fisheries Agency are currently considered WCPFC observers, as those programs have completed the required authorization process to become part of the WCPFC Regional Observer Programme.

The WCPFC Implementation Act states that regulations promulgated under the act shall apply within the boundaries of any of the States of the United States and any commonwealth, territory or possession of the United States (hereafter “State”) bordering on the Convention Area if the Secretary of Commerce has provided notice to the State, the State does not request an agency hearing, and the Secretary of Commerce has determined that the State has not, within a reasonable period of time after the promulgation of regulations, enacted laws or promulgated regulations that implement the recommendations of the WCPFC within the boundaries of the State; or has enacted laws or promulgated regulations that implement the recommendations of the WCPFC that are less restrictive than the regulations promulgated under the WCPFC Implementation Act or are not effectively enforced (16 U.S.C. 6907(e)). NMFS will furnish

copies of the proposed rule to American Samoa, Guam, Hawaii, and the Commonwealth of the Northern Mariana Islands at the time of publication in the Federal Register and will be available to discuss ways to ensure that the conservation and management measures implemented in this rulemaking can be consistently applied to federal, state, and territorial managed fisheries.

For the whale shark, the first element of the proposed rule would prohibit owners, operators, and crew of fishing vessels from setting or attempting to set a purse seine in the Convention Area on or around a whale shark if the animal is sighted prior to the commencement of the set or the attempted set. CMM 2012-04 includes language making the prohibition specific to “a school of tuna associated with a whale shark.” However, it is unclear exactly what this phrase means. Thus, NMFS believes it is appropriate to apply this prohibition to any purse seine set or attempted set on or around a whale shark that has been sighted prior to commencement of the set or attempted set. This prohibition would not apply to sets made in the territorial seas or archipelagic waters of any nation or in the EEZs of the PNA. The proposed rule would also include a definition of the PNA as the Pacific Island countries that are parties to the Nauru Agreement Concerning Cooperation in the Management of Fisheries of Common Interest, as specified on the Web site of the Parties to the Nauru Agreement at www.pnatuna.com. The PNA currently includes the following countries: Federated States of Micronesia, Kiribati, Marshall Islands, Nauru, Palau, Papua New Guinea, Solomon Islands, and Tuvalu. Vessel owners and operators may be subject to similar prohibitions regarding the whale shark in the EEZs of the PNA, if implemented by the PNA in accordance with the Third Arrangement.

The second element for the whale shark in the proposed rule would require the crew, operator, and owner of a fishing vessel to release any whale shark that is encircled in a purse seine net in the Convention Area, and must take reasonable steps are taken to ensure its safe

release, without compromising the safety of any persons. This element also would not apply in the territorial seas or archipelagic waters of any nation, but would apply in the EEZs of the PNA.

The third and final element for the whale shark in the proposed rule would require the owner and operator of a fishing vessel that encircles a whale shark with a purse seine in the Convention Area to ensure that the incident is recorded by the end of the day on the catch report form, or Regional Purse Seine Logsheet (RPL), maintained pursuant to § 300.34(c)(1), in the format specified by the Pacific Islands Regional Administrator. The Pacific Islands Regional Administrator would provide vessel owners and operators with specific instructions for how to record whale shark encirclements on the RPL.

Classification

The Administrator, Pacific Islands Region, NMFS, has determined that this proposed rule is consistent with the WCPFC Implementation Act and other applicable laws, subject to further consideration after public comment.

Executive Order 12866

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

Regulatory Flexibility Act

An initial regulatory flexibility analysis (IRFA) was prepared, as required by section 603 of the Regulatory Flexibility Act. The IRFA describes the economic impact this proposed rule would have on small entities, if adopted. A description of the action, why it is being considered, and the legal basis for this action are contained in the SUMMARY section of the preamble and in other sections of this SUPPLEMENTARY INFORMATION section of the preamble. The analysis follows:

Estimated Number of Small Entities Affected

The proposed rule would apply to owners and operators of U.S. fishing vessels used to fish for HMS for commercial purposes in the Convention Area. This includes vessels in the purse seine, longline, tropical troll (including those in American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, and Hawaii), Hawaii handline, Hawaii pole-and-line, and west coast-based albacore troll fleets. The estimated number of affected fishing vessels is as follows, broken down by fleet: 40 purse seine vessels (based on the number of purse seine vessels licensed under the South Pacific Tuna Treaty as of March 2014); 165 longline vessels (based on the number of longline vessels permitted to fish as of July 2014 under the Fishery Ecosystem Plan for Pacific Pelagic Fisheries of the Western Pacific Region, which includes vessels based in Hawaii (a total of 164 Hawaii Longline Limited Entry permits are available), American Samoa (a total of 60 American Samoa Longline Limited Entry permits are available), and the Mariana Islands); 2,089 tropical troll and 572 Hawaii handline vessels (based on the number of active troll and handline vessels in American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, and Hawaii in 2012, the latest year for which complete data are available); 1 tropical pole-and-line vessel (based on the number of active vessels in 2012), and 13 albacore troll vessels (based on the number of albacore troll vessels authorized to fish on the high seas in the Convention Area as of July 2014). Thus, the total estimated number of vessels that would be subject to the rule is approximately 2,878.

On June 12, 2014, the Small Business Administration (SBA) issued an interim final rule revising the small business size standards for businesses including those in the fishing industry, effective July 14, 2014 (79 FR 33647). The rule increased the size standard for Finfish Fishing to \$20.5 million. Based on (limited) available financial information about the affected fishing fleets

and the SBA's definition of a small finfish harvester (i.e., gross annual receipts of less than \$20.5 million, independently owned and operated, and not dominant in its field of operation), and using individual vessels as proxies for individual businesses, NMFS believes that all of the affected fish harvesting businesses are small entities. As indicated above, there are currently 40 purse seine vessels in the affected purse seine fishery. Average annual receipts for each of the 40 vessels during the last three years for which reasonably complete data are available, 2010-2012, were estimated by multiplying the vessel's reported retained catches of each of skipjack tuna, yellowfin tuna, and bigeye tuna in each year by an indicative regional cannery price for that species and year (developed by the Pacific Islands Forum Fisheries Agency and available at <https://www.ffa.int/node/425#attachments>), summing the receipts across species for each year, and averaging the total estimated receipts across the three years. The estimated average annual receipts for each of the 40 vessels were less than \$20.5 million.

Recordkeeping, Reporting, and Other Compliance Requirements

The reporting, recordkeeping and other compliance requirements of this proposed rule are described earlier in the preamble. The classes of small entities subject to the requirements and the costs of complying with the proposed requirements are described below for each of the six elements of the proposed rule – three elements regarding the oceanic whitetip shark and silky shark and three elements regarding the whale shark.

Oceanic Whitetip Shark and Silky Shark Element (1): Prohibit the crew, operator, and owner of a fishing vessel from retaining on board, transshipping, storing, or landing any oceanic whitetip shark or silky shark: This element would prohibit the crew, operator, and owner of a fishing vessel of the United States used for commercial fishing for HMS from retaining on board, transshipping, storing, or landing any part or whole carcass of an oceanic whitetip shark or silky

shark that is caught in the Convention Area. This requirement would not impose any new reporting or recordkeeping requirements. It is not expected to require any professional skills that the affected vessel owners, operators and crew do not already possess. This requirement would apply to owners, operators and crew of any vessel used to fish for HMS for commercial purposes in the Convention Area. Accordingly, it would apply to all vessels identified above. Based on the best available data, oceanic whitetip shark and silky shark are not caught in the Hawaii handline fishery, the Hawaii pole-and-line fishery, or the albacore troll fishery. Thus, compliance costs are expected only in the purse seine, longline, and tropical troll fleets. This requirement would foreclose harvesting businesses' opportunity to retain and sell or otherwise make use of the two species. The compliance cost for each entity can be approximated by the ex-vessel value of the amount of the two species that would be expected to be retained if it were allowed (under no action). Price data for specific shark species and in specific fisheries is lacking, so this analysis assumes that the ex-vessel value of both species in all affected fisheries is \$1.50/kg, which is the 2011 ex-vessel price (converted to 2013 dollars) for sharks generally in Hawaii's commercial pelagic fisheries (which do not include the purse seine fishery, in which the fate and value of retained sharks are not known). Expected retained amounts of each of the two species in each fishery (under no action) are based on the recent level of fishing effort multiplied by the recent retention rate per unit of fishing effort. For all fisheries except the purse seine fishery, the average of the last five years for which complete data are available, 2008-2012, is used. The analysis of impacts for the purse seine fishery uses fishing effort and the retention rate averaged over 2010 and 2011 because the fleet was substantially smaller than the current 40-vessel size in years previous to 2010, 100% observer coverage started in 2010, and 2011 is the last year for which near-complete data are available. Fishing effort estimates are based on vessel logbook

data, except in the case of the American Samoa, CNMI, and Guam troll fisheries, for which creel survey data are used. Recent retention rates in the purse seine and longline fisheries are estimated from vessel observer data. In the Hawaii troll fishery, vessel logbook data are used, and in the American Samoa, CNMI, and Guam troll fisheries, creel survey data are used. Fish numbers are converted to weights based on vessel observer data for each fishery, except for the troll fisheries, for which weight data are lacking and the average weights in the Hawaii deep-set longline fishery are used. The average weights used are, for oceanic whitetip shark and silky shark, respectively: purse seine: 23 kg and 32 kg; Hawaii deep-set longline: 27 kg and 28 kg; Hawaii shallow-set longline: 27 kg and 28 kg; American Samoa longline: 26 kg and 18 kg; and tropical troll: 27 kg (the two species cannot be accurately distinguished in the data and are combined for the purpose of this analysis).

In the purse seine fishery, in which about 40 vessels are expected to participate in the near future, it is estimated that 0.1 oceanic whitetip shark and 2.9 silky shark would be retained (under no action) per vessel per year, on average. Applying the average weights and price given above, these amounts equate to estimated lost annual revenue of about \$140 per vessel, on average.

As indicated above, about 162 vessels are expected to participate in the affected longline fisheries in the near future. The longline fisheries operating in the Convention Area include the Hawaii-based fisheries, which include a tuna-targeting deep-set fishery and swordfish-targeting shallow set fishery, and the American Samoa-based fishery. Occasionally there is also longline fishing by vessels based in the Mariana Islands, where participation is typically fewer than three vessels in any given year. No vessel observer data are available specifically for the Mariana Islands longline fishery, making it difficult to analyze shark catch rates, but shark catch rates in

the other longline fisheries might be reasonable proxies for catch rates in the Mariana Islands fishery. In that case, to the extent either oceanic whitetip shark or silky shark is caught and retained in the Mariana Islands longline fishery in the future, the effects of the proposed rule can be expected to be about the same – on a per-unit of fishing effort basis – as those in the other longline fisheries, as described here. In the Hawaii and American Samoa longline fisheries, it is estimated that 0.2 oceanic whiteip shark and 0.1 silky shark would be retained (under no action) per vessel per year, on average. These amounts equate to estimated lost annual revenue of about \$12 per vessel, on average.

Catch and retention rates of the two shark species in the tropical troll fisheries are difficult to estimate for several reasons. For example, in the Hawaii troll fishery, there is no species code for silky shark so any catches of that species are recorded as unidentified sharks. In the troll fisheries of the three territories, because the two carcharhinid species are retained only infrequently, it is difficult to generate estimates of total catches of the two species with much certainty using the creel surveys that sample only a subset of all fishing trips. Because of these and other limitations, only very approximate estimates can be made. For this analysis, all unidentified sharks in the data are assumed to be oceanic whitetip shark or silky shark, so the resulting estimates are upper-bound estimates. In the Hawaii troll fishery it is estimated that 9 sharks would be retained (under no action) per year, on average, for the fishery as a whole. With approximately 1,694 vessels expected to participate in the fishery (based on the number active in 2012), this equates to about 0.01 sharks per vessel per year, and an estimated lost annual revenue of less than one dollar per vessel. The Guam troll fishery, with about 351 vessels expected to participate in the near future, is expected to retain about 2 sharks per year (under no action), on average, for the fleet as a whole. This equates to about 0.01 sharks per vessel per year, and an

estimated annual compliance cost of less than one dollar per vessel. In the American Samoa troll fishery, it is estimated that about 0.3 sharks would be retained, on average, per year (under no action). With about 9 vessels expected to participate in the fishery, this equates to about 0.03 sharks per vessel per year, and an estimated annual compliance cost of less than one dollar per vessel. The creel survey encountered no retained sharks in the CNMI troll fishery in 2008-2012, so the best estimate of lost annual revenue for each of the approximately 35 vessels expected to participate in this fishery is zero.

Oceanic Whitetip Shark and Silky Shark Element (2): Require the crew, operators, and owners of U.S. fishing vessels used for commercial fishing for HMS in the Convention Area to release any oceanic whitetip shark or silky shark caught in the Convention Area: This element would require the vessel crew, operator, and owner to release any oceanic whitetip shark or silky shark caught in the Convention Area as soon as possible after the shark is caught and brought alongside the vessel and take reasonable steps to ensure its safe release, without compromising the safety of any persons. This requirement would not impose any new reporting or recordkeeping requirements. It is not expected to require any professional skills that the affected vessel owners, operators and crew do not already possess. This requirement could bring costs in the form of reduced efficiency of fishing operations, but it is difficult to assess the costs because it is not possible to predict whether or how vessel operators and crew would change their release/discard practices relative to what they do currently. For purse seine vessels, it is expected that in most cases, the fish would be released after it is brailled from the purse seine and brought on deck. In these cases, the labor involved would probably be little different than current practice for discarded sharks. If the vessel operator and crew determined that it is possible to release the fish before it is brought on deck, this would likely involve greater intervention and time on the

part of crew members, with associated labor costs. For longline and troll vessels, it is expected that the fish would be quickly released as it is brought to the side of the vessel, such as by cutting the line or removing the hook. In these cases, no costs would be incurred. In some cases the vessel operator and crew might determine that it is necessary to bring the fish on board the vessel before releasing it. This would involve greater labor than releasing the fish from alongside the vessel, but the circumstances in these cases might be unchanged from the current situation, in which case no new costs would be incurred.

Oceanic Whitetip Shark and Silky Shark Element (3): Require the crew, operators, and owners of U.S. fishing vessels used for commercial fishing for HMS in the Convention Area to allow and assist observers in the collection of oceanic whitetip shark or silky shark samples: This element would require the vessel crew, operator, and owner to allow and assist a WCPFC observer to collect samples of dead oceanic whitetip sharks or silky sharks when requested to do so by the observer. In such cases, and in any case in which the observer collects a sample of an oceanic whitetip shark or silky shark, the crew, operator, and owner would be relieved of the two requirements listed above. Under existing regulations, operators and crew of vessels with WCPFC Area Endorsements (i.e., vessels authorized to be used for commercial fishing for HMS on the high seas in the Convention Area) are already required to assist observers in the collection of samples. This would effectively expand that requirement – for just these two shark species – to vessels not required to have WCPFC Area Endorsements. This requirement would not impose any new reporting or recordkeeping requirements. It is not expected to require any professional skills that the affected vessel owners, operators and crew do not already possess. Although this element would relieve vessel owners, operators and crew from the requirements of the first two elements described above in those cases where the vessel observer collects a sample of an

oceanic whitetip shark or silky shark, it would not be expected to relieve fishing businesses of the costs identified above for the no-retention requirement, since the samples would be kept by the observer and would not be available for sale or other use by the fishing business. This element could also bring additional costs to fishing businesses because it would require the owner, operator, and crew to assist the observer in the collection of samples if requested to do so by the observer. Observers would be under instructions to collect samples only if they do so as part of a program that has been specifically authorized by the WCPFC Scientific Committee, and only from sharks that are dead when brought alongside the vessel. It is not possible to project how often observers would request assistance in collecting samples. When it does occur, it is not expected that sample collection would be so disruptive as to substantially delay or otherwise impact fishing operations, but the fishing business could bear small costs in terms of crew labor, and possibly the loss of storage space that could be used for other purposes.

Whale Shark Element (1): Prohibit owners, operators, and crew of U.S. fishing vessels used for commercial fishing for HMS in the Convention Area from setting or attempting to set a purse seine on or around a whale shark: This requirement would prohibit owners, operators and crew of fishing vessels from setting or attempting to set a purse seine in the Convention Area on or around a whale shark if the animal is sighted prior to the commencement of the set or the attempted set. This requirement would apply to all U.S. purse seine vessels fishing on the high seas and in the EEZs in the Convention Area, except the EEZs of the PNA. This requirement would not impose any new reporting or recordkeeping requirements. It is not expected to require any professional skills that the affected vessel owners, operators and crew do not already possess. In the event that a whale shark is sighted in the vicinity of a purse seine vessel prior to a desired set, complying with the proposed rule could cause forgone fishing opportunities and

result in economic losses. It is difficult to project the frequency of pre-set whale shark-sighting events because such events are not recorded. Historical data on whale shark catches are available, but catches are not equivalent to pre-set whale shark sightings, for two reasons. On the one hand, presumably not all whale sharks within “sightable” distance of a set are actually caught (thus, in this respect, whale shark catch data under-represent pre-set whale shark sighting events). On the other hand, according to anecdotal information from purse seine vessel operators, not all captured whale sharks are seen before the set commences (thus, in this respect, the whale shark catch data over-represent pre-set whale shark-sighting events). Nonetheless, historical whale shark catch rates can provide a rough indicator of the frequency of pre-set whale shark sighting events in the future. Based on unpublished vessel observer data from the FFA observer program, the average whale shark catch rate in 2010-2011 for the U.S. purse seine fishery in the Convention Area, excluding the EEZs of the PNA, was approximately 2 fish per thousand fishing days. The average catch rate during that period in the Convention Area as a whole (including the waters of the PNA EEZs) was about 5 fish per thousand fishing days. For this analysis, this range of 2-5 events per thousand fishing days is used as an estimate of pre-set whale shark-sighting events in the future. Based on the average levels of U.S. purse seine fishing effort in the Convention Area outside the EEZs of the PNA in 2010 and 2011 (462 and 842 fishing days, respectively; NMFS unpublished data), it can be expected that approximately 652 fishing days per year will be spent by the fleet in that area in the future. At that level of fishing effort, if pre-set whale shark-sighting events occurred in 2 to 5 per thousand fishing days, as described above, they would occur 1.3 to 3.3 times per year, on average, for the fleet as a whole, or 0.03 to 0.08 times per year for each of the 40 vessels in the fleet, on average. In those instances that a whale shark is sighted prior to an intended set, the vessel operator would have to

wait and/or move the vessel to find the next opportunity to make a set. The consequences in terms of time lost and distance travelled and associated costs cannot be projected with any certainty. At best, the operator would find an opportunity to make a set soon after the event, and only trivial costs would be incurred. At worst, the vessel operator would lose the opportunity to make a set for the remainder of the day. Under this worst-case assumption, a vessel could lose the net benefits associated with 0.03 to 0.08 fishing days per year, on average. Those lost net benefits cannot be estimated because of a lack of fishing cost data, but information on gross receipts can provide an upper-bound estimate. Using regional cannery prices in 2012 for each of the three marketable tuna species, and the U.S. fleet's average catches and fishing days in 2011-2012, the expected gross receipts per fishing day would be about \$60,000. Thus, an upper-bound estimate of the loss in gross revenue that could occur to a vessel as a result of losing 0.03 to 0.08 fishing days is approximately \$1,800 to \$4,800 per year.

Whale Shark Element (2): Require the crew, operator, and owner of U.S. fishing vessels used for commercial fishing for HMS in the Convention Area to release any whale shark that is encircled in a purse seine net: This element would require the crew, operator, and owner of a fishing vessel to release any whale shark that is encircled in a purse seine net in the Convention Area, and to do so in a manner that results in as little harm to the shark as possible, without compromising the safety of any persons. This requirement would apply to all U.S. purse seine vessels fishing on the high seas and in the EEZs of the Convention Area, including the EEZs of the PNA. This requirement would not impose any new reporting or recordkeeping requirements. It is not expected to require any professional skills that the affected vessel owners, operators and crew do not already possess. Unpublished historical vessel observer data from the FFA observer program indicates that all whale sharks captured in the U.S. WCPO purse seine fishery are

released; that is, they are not retained or marketed. The release requirement, therefore, is not expected to have any effect on fishing operations or to bring any compliance costs. The requirement to release the sharks in a manner that results in as little harm to the shark as possible without compromising the safety of any persons would be a new and potentially burdensome requirement, but it is not possible to quantitatively assess the cost for two reasons. First, it is not clear how often whale sharks would be encircled. As indicated above, the average annual rate by U.S. purse seine vessels in the Convention Area in 2010 and 2011 was about 5 encirclements per thousand fishing days. But the rate in the future is expected to be reduced as a result of the setting prohibition described in the first whale shark element, above. Nonetheless, if 5 encirclements per thousand fishing days is considered an upper-bound projection, then at a future fishing effort rate of 7,991 fishing days per year in the Convention Area (based on the average spent in 2010 and 2011) and 40 vessels in the fleet, an upper-bound projection of the rate of encirclements per vessel is one per year, on average. The second reason for the difficulty in assessing the compliance costs of this requirement is that current vessel practices regarding whale shark releases are not known in detail. Although data on the condition of each captured whale shark is available (e.g., based on unpublished FFA observer data for 2010 and 2011, 68% of captured whale sharks were released alive, 2% were released dead, and the condition of the remainder was unknown), these data do not reveal anything about whether the condition of the released whale sharks could have been better, or what the vessel crew would have had to have done to improve the sharks' condition. In conclusion, this requirement might bring some costs to purse seine vessel operations, in the form of the crew potentially having to spend more time handling encircled whale sharks (at most, one per year per vessel, on average) in order to release them with as little harm as possible.

Whale Shark Element (3): Require the owner and operator of a fishing vessel that encircles a whale shark to record the incident on a catch report form: This requirement would require the owner and operator of a fishing vessel that encircles a whale shark with a purse seine net in the Convention Area to ensure that the incident is recorded by the end of the day on the catch report form, or Regional Purse Seine Logsheet (RPL) maintained pursuant to 50 CFR300.34(c)(1), in the format specified by the NMFS Pacific Islands Regional Administrator. This requirement would apply to all U.S. purse seine vessels fishing on the high seas and in the EEZs of the Convention Area, including the EEZs of the PNA. Because catch and effort logbooks are already required to be maintained and submitted in the purse seine fishery, there would be no additional cost associated with submitting the logbook, but vessels would be required to record additional information associated with whale shark encirclements. The required information for each incident would include a description of the steps taken to minimize harm and an assessment of its condition upon its release. This additional information requirement would be added to the information required to be reported under a current information collection (OMB control number 0648-0218; see the section on the Paperwork Reduction Act below for more information). As indicated for the previous element, it is not possible to project the rate of encirclements with certainty, but one encirclement per vessel per year, on average, is an upper-bound projection. NMFS estimates that it would take about 10 minutes to record the required information for each encirclement. At an estimated labor cost of \$25 per hour, the annual cost per vessel would be about \$4.

There would be no disproportionate economic impacts between small and large vessel-operating entities resulting from this rule. Furthermore, there would be no disproportionate economic impacts based on vessel size, gear, or homeport, as all the vessels in

the fleets would be subject to the same requirements and NMFS has not identified any factors related to vessel size, gear, or homeport that would lead to disproportionate impacts.

Duplicating, Overlapping, and Conflicting Federal Regulations

NMFS has identified two Federal regulations that overlap with the proposed regulations.

First, the regulation at 50 CFR 300.25(e)(4) prohibits the crew, operator, or owner of a U.S. fishing vessel used to fish for HMS in the eastern Pacific Ocean – specifically, east of 150° W. longitude in the Pacific Ocean, between the latitudes of 40° N. and 40° S. – from retaining on board, transshipping, landing, storing, selling, or offering for sale any part or whole carcass of an oceanic whitetip shark. The regulation also requires the crew, operator and owner to release unharmed, to the extent practicable, all oceanic whitetip shark when brought alongside the vessel. The area of application of this regulation overlaps with the area of application of the oceanic whitetip shark requirements of these proposed regulations. Specifically, both regulations would apply in the area of overlap between the respective areas of application of the Convention and of the Antigua Convention, which is the area bounded by the latitudes of 4° S. and 40° S. and the longitudes of 130° W. and 150° W. Although the two regulations would overlap geographically, they would not conflict or establish duplicative or redundant requirements because compliance with one of the two regulations would satisfy compliance with the other regulation.

Second, the regulation at 50 CFR 300.215(c)(3)(iii) requires that operators and crew of vessels that are required to have WCPFC Area Endorsements (i.e., vessels authorized to be used for commercial fishing for HMS on the high seas in the Convention Area) assist WCPFC observers in the collection of samples. The proposed rule would establish a similar requirement for all U.S. vessels used for fishing for HMS in the Convention Area, but it would be limited to

the collection of oceanic whitetip shark and silky shark samples. Thus, the two regulations would overlap with each with respect to the two shark species and vessels required to have WCPFC Area Endorsements. However, the two regulations would not conflict or establish duplicative or redundant requirements because compliance with one of the two regulations would satisfy compliance with the other.

NMFS has not identified any Federal regulations that duplicate or conflict with the proposed regulations.

Alternatives to the Proposed Rule

NMFS has not identified any significant alternatives to the proposed rule for the oceanic whitetip shark and silky shark elements, other than the no-action alternative. NMFS considered alternatives for the whale shark elements of the proposed rule. As discussed above, the first element of the proposed rule for the whale shark would prohibit owners, operators, and crew of fishing vessels from setting or attempting to set a purse seine in the Convention Area on or around a whale shark if the animal is sighted prior to the commencement of the set or the attempted set. This element would apply on the high seas and in the EEZs of the Convention Area, except for the EEZs of the PNA. CMM 2012-04 states that “CCMs shall prohibit their flagged vessels from setting a purse seine on a school of tuna associated with a whale shark if the animal is sighted prior to the commencement of the set” (emphasis added). NMFS considered developing alternative means of implementing the prohibition on setting on a school of tuna, such as specifying a minimum distance for the prohibition (e.g., no setting within half a mile of a whale shark sighting) or a minimum time period for the prohibition (e.g., no setting within 10 minutes of sighting a whale shark). However, NMFS did not identify any such alternative for this element that would be reasonable and feasible. After a whale shark is sighted, it is unclear where

and when it will next be sighted, since sharks do not have to return to the surface regularly to breathe. Therefore, NMFS determined that there is only one reasonable and feasible manner of implementing this element of the proposed rule.

CMM 2012-04 also states that for fishing activities in the EEZs of CCMs north of 30° N. latitude, CCMs shall implement either the provisions of CMM 2012-04 or compatible measures consistent with the obligations under CMM 2012-04. The U.S. purse seine fleet does not fish north of 30° N. latitude in the WCPO. Thus, rather than attempting to develop a separate set of “compatible measures” for EEZs of CCMs north of 30 °N. latitude that may or may not be triggered by any actual U.S. purse seine operations, NMFS decided to implement the provisions of CMM 2012-04 for all EEZs in the Convention Area (with the exception of the first element not being applicable to the EEZs of the PNA, as described above). NMFS did not identify any other alternatives for any of the elements of the proposed rule.

Taking no action could result in lesser adverse economic impacts than the proposed action for many affected entities, but NMFS has determined that the no-action alternative would fail to accomplish the objectives of the WCPFC Implementation Act, including satisfying the obligations of the United States as a Contracting Party to the Convention.

Paperwork Reduction Act

This proposed rule contains a change request to a collection-of-information subject to the Paperwork Reduction Act (PRA) that has been approved by the Office of Management and Budget (OMB) under control number 0648-0218, “South Pacific Tuna Act” (the whale shark encirclement reporting requirement). The public reporting burden for the catch report form (also known as the RPL) under that collection-of-information is estimated to average one hour per response (i.e., per fishing trip), including the time for reviewing instructions, searching existing

data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Under this proposed rule, in the event that a whale shark is encircled in a purse seine net, information about that event would be required to be included in the catch report form. Providing this additional information would increase the reporting burden by approximately 10 minutes per encirclement, which, given an estimated one encirclement per year and five fishing trips per year, on average, equates to approximately 2 minutes per fishing trip or per response. Therefore, the new estimated burden per response (i.e., per fishing trip) for the catch report form would be 62 minutes. Send comments regarding this burden estimate, or any other aspect of this data collection, including suggestions for reducing the burden, to Michael D. Tosatto, Regional Administrator, NMFS PIRO (see ADDRESSES) and by e-mail to OIRA_Submission@omb.eop.gov or fax to 202-395-7285.

Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

List of Subjects in 50 CFR Part 300

Administrative practice and procedure, Fish, Fisheries, Fishing, Marine resources,
Reporting and recordkeeping requirements, Treaties.

Dated: August 19, 2014

Samuel D. Rauch III,
Deputy Assistant Administrator for Regulatory Programs,
National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 300 is proposed to be amended as follows:

PART 300—INTERNATIONAL FISHERIES REGULATIONS

1. The authority citation for 50 CFR part 300, subpart O, continues to read as follows:

Authority: 16 U.S.C. 6901 et seq.

2. In § 300.211, the definition of “Parties to the Nauru Agreement” is added, in alphabetical order, to read as follows:

§ 300.211 Definitions.

* * * * *

Parties to the Nauru Agreement means the parties to the Nauru Agreement Concerning Cooperation in the Management of Fisheries of Common Interest, as specified on the Web site of the Parties to the Nauru Agreement at www.pnatuna.com.

* * * * *

3. In § 300.218, paragraph (g) is added to read as follows:

§ 300.218 Reporting and recordkeeping requirements.

* * * * *

(g) Whale shark encirclement reports. The owner and operator of a fishing vessel of the United States used for commercial fishing in the Convention Area that encircles a whale shark (Rhincodon typus) with a purse seine in the Convention Area shall ensure that the incident is recorded by the end of the day on the catch report forms maintained pursuant to § 300.34(c)(1), in the format specified by the Pacific Islands Regional Administrator. This paragraph does not apply to the territorial seas or archipelagic waters of any nation, as defined by the domestic laws and regulations of that nation and recognized by the United States.

4. In § 300.222, paragraphs (rr), (ss), (tt), (uu), and (vv) are added to read as follows:

§ 300.222 Prohibitions.

* * * * *

(rr) Fail to submit, or ensure submission of, a whale shark encirclement report as required in § 300.218(g).

(ss) Set or attempt to set a purse seine on or around a whale shark (Rhincodon typus) in contravention of § 300.223(g).

(tt) Fail to release a whale shark encircled in a purse seine net of a fishing vessel as required in § 300.223(h).

(uu) Use a fishing vessel to retain on board, transship, store, or land any part or whole carcass of an oceanic whitetip shark (Carcharhinus longimanus) or silky shark (Carcharhinus falciformis) in contravention of § 300.226(a).

(vv) Fail to release an oceanic whitetip shark or silky shark as required in § 300.226(b).

5. In § 300.223, paragraphs (g) and (h) are added to read as follows:

§ 300.223 Purse seine fishing restrictions.

* * * * *

(g) Owners, operators, and crew of fishing vessels of the United States used for commercial fishing for HMS in the Convention Area shall not set or attempt to set a purse seine in the Convention Area on or around a whale shark (Rhincodon typus) if the animal is sighted at any time prior to the commencement of the set or the attempted set. This paragraph does not apply to the territorial seas or archipelagic waters of any nation, as defined by the domestic laws and regulations of that nation and recognized by the United States, or to areas under the national jurisdiction of the Parties to the Nauru Agreement.

(h) The crew, operator, and owner of a fishing vessel of the United States used for commercial fishing for HMS in the Convention Area must release any whale shark that is encircled in a purse seine net in the Convention Area, and take reasonable steps for its safe release, without compromising the safety of any persons. This paragraph does not apply to the

territorial seas or archipelagic waters of any nation, as defined by the domestic laws and regulations of that nation and recognized by the United States.

6. Section 300.226 is added to read as follows:

§ 300.226 Oceanic whitetip shark and silky shark.

(a) The crew, operator, and owner of a fishing vessel of the United States used for commercial fishing for HMS cannot retain on board, transship, store, or land any part or whole carcass of an oceanic whitetip shark (Carcharhinus longimanus) or silky shark (Carcharhinus falciformis) that is caught in the Convention Area, unless subject to the provisions of paragraph (c) of this section.

(b) The crew, operator, and owner of a fishing vessel of the United States used for commercial fishing for HMS must release any oceanic whitetip shark or silky shark caught in the Convention Area as soon as possible after the shark is caught and brought alongside the vessel, and take reasonable steps for its safe release, without compromising the safety of any persons, unless subject to the provisions of paragraph (c) of this section.

(c) Paragraphs (a) and (b) of this section do not apply in the event that a WCPFC observer collects, or requests the assistance of the vessel crew, operator, or owner in the observer's collection of, samples of oceanic whitetip shark or silky shark in the Convention Area.

(d) The crew, operator, and owner of a fishing vessel of the United States used for commercial fishing for HMS in the Convention Area must allow and assist a WCPFC observer to collect samples of oceanic whitetip shark or silky shark in the Convention Area, if requested to do so by the WCPFC observer.

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